

Chronic Pain: Consultation Summary

Date: October 1st, 2004

Background

In October 2003, the Supreme Court of Canada rendered a decision that requires the WCB to individually assess injured workers with chronic pain and to provide them with the same access to the workers' compensation system as all other workers.

In response to this decision, Government tabled Bill 20 in the Legislature. Even though chronic pain is part of Bill 20, the Minister of Environment and Labour asked the WCB to make a recommendation on how to compensate workers with chronic pain.

Throughout December 2003 and January 2004 the WCB sought workers' and employers' opinions on a new approach to chronic pain. This input along with the opinions of medical experts, research on how other provinces compensate for chronic pain and the instructions provided by the Supreme Court of Canada all were considered. Law Amendments hearings on Bill 20 also were held in January and February 2004 where workers and employers had an opportunity to provide their opinions on chronic pain directly to Government. The WCB monitored the Law Amendments hearings and considered the input raised through this process as well.

With this information, the WCB prepared a recommendation on a new approach to chronic pain for Government's consideration. In March the WCB recommended that a modified approach to the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition* be used to assess workers with chronic pain. The WCB indicated to Government that the new approach could be accomplished through policy, regulation or legislation.

In May, Government announced that it had accepted the WCB's recommendation and that it would develop new chronic pain regulations. Following another period of consultation, Government enacted *Chronic Pain Regulations* on July 22, 2004 that outline the general rules of entitlement to compensation related to chronic pain.

Policy Consultation

To ensure the WCB's policies reflect the new regulations, a number of proposed policy changes were identified and for 30 days in August stakeholders had an opportunity to provide input on the draft chronic pain policies.

Approximately 100 workers and employers participated in the policy consultation process. In Nova Scotia, chronic pain is a controversial issue and the input received reflected stakeholders' divergent views on this topic. Some stakeholders supported the proposed policy changes and felt the policies were

fair, while others believed the policies provided too much or too little by way of compensation.

Much of the input provided was of a claim-specific nature (such as a history of the worker's injury; the impact chronic pain has had on the worker's life, or questions about the application of certain parts of the policies) and the WCB responded directly to the workers who raised these questions. All of the claim-specific information received was forwarded to the Transition Services Team to be included in the worker's file. Because information pertaining to an individual worker's claim is confidential, the responses to these questions are not reported in this document.

This report summarizes the key policy issues raised by stakeholders and provides the rationale for why the WCB *did* or *did not* revise the chronic pain policies to reflect this input.

As noted above, since the Supreme Court rendered its decision in October 2003, stakeholders have had a number of opportunities to provide input into the development of a new approach to chronic pain in Nova Scotia.

At the point Government enacted *Chronic Pain Regulations*, the rules concerning eligibility, assessment approach, compensation payable and the retroactivity period were finalized. The WCB policies mirror much of the information contained in the *Chronic Pain Regulations*. The WCB believes it is important to restate the rules around chronic pain in policy, as WCB policy tends to be more accessible to clients than Regulation. Further, it also ensures the WCB policy manual presents a complete picture of the benefits that are available to clients and the assessment guidelines and rating schedules used in different circumstances.

However, during the policy consultation process some workers and employers revisited the rules that are already defined in Regulation (for example, some suggested that chronic pain benefits be provided to workers injured prior to April 17, 1985; the WCB not provide benefits for "unratable" chronic pain; s.10 of the *Workers' Compensation Act* be struck down and the entire workers' compensation benefit regime be changed such that all workers are eligible to receive earnings loss benefits) and asked that the WCB implement these changes by way of policy. WCB policy must be consistent with the *Workers' Compensation Act* and Regulations. Issues raised by stakeholders that are outside the scope of WCB policy or those not directly related to chronic pain are not included in this summary.

The WCB considered all of the input from stakeholders that was raised during the policy consultation process and approved chronic pain policies on September 9, 2004.

Highlights of Policy Themes Identified during the Consultation Process:

Suggested Policy Changes Raised by Workers:

1. Chronic pain benefits should be retroactive to the date of injury.

Response:

Chronic pain does not develop immediately at the time of injury. Following an injury, people go through various stages of pain, which is considered a normal part of the recovery process. At the outset, a worker may experience acute pain, this is short-term pain that is immediately triggered by the injury and is expected.

Chronic pain is multi-causal and is outside the normal recovery process. As the injury heals a worker's recovery may not progress as expected. This may indicate the worker is at risk of developing chronic pain. At this time, the WCB will offer appropriate services to prevent the worker from developing chronic pain.

However, if the worker reaches maximum medical recovery and continues to experience pain beyond what is expected for the injury, it is considered that the worker has developed chronic pain. The *Workers' Compensation Act* defines chronic pain in s.10A.

The presence of chronic pain in and of itself does not necessarily mean a worker's activities of daily living or capacity to work have been impacted. Many workers with permanent impairment such as chronic pain live active and productive lives.

Therefore, chronic pain benefits will be paid effective the date the WCB determines the worker has a pain-related impairment (i.e. the date the WCB determines chronic pain has slightly or substantially impacted the worker's activities of daily living or their functional capacity.)

2. Although Amended Interim Earnings Loss (AIEL) recipients will be assessed in the same manner as all other workers, they are being excluded from the full benefits of the Legislation. Give this group the same access to benefits as all other workers.

Response:

The WCB must ensure AIEL recipients with chronic pain are treated in the same manner as other AIEL recipients.

Currently, when an AIEL recipient who does not have chronic pain receives a Permanent Medical Impairment (PMI) increase, the WCB compares their cumulative Clinical Rating Scale (CRS) pension to their AIEL benefit and pays whichever is greater. In many situations the AIEL benefit continues to be greater and the worker's benefit does not change. At age 65, the AIEL benefit is replaced by the cumulative CRS pension, which includes the PMI increase.

The approach for AIEL recipients with chronic pain is the same. Further, the payment approach outlined in Policy 3.3.5 also recognizes that at certain points in time, an AIEL recipient was in receipt of a CRS pension. During these periods, the AIEL recipient will be treated the same as all other workers injured prior to March 23, 1990 and may be entitled to payment of the 3% or 6% pain-related impairment award.

3. Conducting a pain-related impairment (PRI) assessment by means of a file review is concerning. Files may not reflect an accurate picture of pain being experienced by the worker. Any worker with chronic pain who has not been adequately assessed since the *Martin* decision should be entitled to additional testing.

One of the reasons the WCB opted to conduct PRI assessments, where appropriate, by means of a file review was based on input received from workers in previous consultation sessions on chronic pain. Many workers felt that they have already undergone extensive testing and assessment and that all of the information needed to determine their degree of impairment is on file.

The WCB agreed that in cases where all the necessary information to complete the PRI assessment was on file, the assessment could be conducted by means of a file review. That being said, if the information on file does not present a complete picture of the impact chronic pain is having on the injured worker or the information presents an inconsistent picture, the WCB will gather the additional information needed to complete the assessment, and this may include a medical examination or additional testing. Injured workers are encouraged to ensure that any information relevant to conducting a PRI assessment is forwarded to the WCB.

4. The earnings loss benefit formula is unjust – under this scheme an injured worker with chronic pain may receive a greater Permanent Impairment Benefit but an equal amount will be deducted from their earnings loss benefit.

The earnings loss benefit formula is defined in the *Workers' Compensation Act* and applies to all workers injured on or after March 23, 1990 including

those with chronic pain. The formula has not been changed by the *Chronic Pain Regulations*.

The maximum amount of compensation a worker is entitled to receive is 85% of their pre-accident net earnings. In cases where a worker is in receipt of full earnings loss benefits, if the Permanent Impairment Benefit increases due to an increase in the Permanent Medical Impairment, the earnings replacement benefit must be decreased by the same amount to maintain the 85% net pre-accident earnings ceiling.

A worker cannot receive more than a full earnings loss benefit (85% net pre-accident earnings).

- 5. An injured worker's credibility should not be the focus of the assessment. The WCB is not impartial and therefore should not be making decisions about a worker's credibility.**

The WCB has modified the Pain-Related Impairment assessment approach outlined in the *AMA Guides – 5th Edition* to eliminate the need to assign a score to a worker's credibility. Scoring credibility is not considered appropriate in a workers' compensation environment.

Judging a worker's credibility is subjective and can make consistency in decision-making challenging as the credibility score is based on an individual opinion. The WCB would anticipate an increase in appeals if chronic pain benefits were limited or denied based solely on a WCB Medical Advisor's score of a worker's credibility. As a result, the WCB will not score credibility as part of the Pain-Related Impairment assessment.

- 6. Consider a worker with chronic pain has a compensable injury and is in receipt of payment for a 10% disability. If that same worker is awarded a 6% chronic pain award, is the disability set at 16% or does the WCB merge the two awards and say that 10% is an accurate reflection of the pain?**

As for all other injuries, the method used to combine permanent impairment awards depends on the worker's date of injury.

For workers injured prior to January 1, 2000, the WCB determines the degree of permanent medical impairment using the PMI Guidelines. In cases where a PMI awarded under the PMI Guidelines is combined with other permanent impairment awards it is done so by adding the impairment percentages together. For example, a PMI of 10% (awarded under PMI Guidelines) and a PRI of 6% (awarded under *AMA Guides – 5th*) would be added together to result in 16% impairment.

For all injuries on or after January 1, 2000, the WCB uses the *AMA Guides – 4th Edition* to determine the degree of Permanent Medical Impairment. Under the *AMA Guides* impairments are evaluated on the basis of the whole person rather than by adding the individual values. This is done using the Guides' Combined Values Chart. In situations where the PMIs have all been awarded under the *AMA Guides* (4th or 5th edition) the impairment values will be combined in accordance with this Chart. For example a PMI of 10% (awarded under *AMA Guides – 4th*) and a PRI of 6% (awarded under the *AMA Guides – 5th*) would be combined to result in 15% impairment.

Suggested Policy Changes Raised by Employers:

1. While it is important to include input from injured workers in the completion of the Pain-Related Impairment assessment tool, medical practitioners such as doctors, specialists, physiotherapists and occupational therapists have many more years of experience and training to fairly evaluate a claim.

Response:

The WCB will use a multidisciplinary approach, drawing upon different sources of information, to assess the impact of chronic pain on a worker.

The WCB recognizes that health-care professionals and injured workers can provide different types of information. The WCB will rely upon health-care professionals to provide information related to medical, psychological, and functional abilities etc. On the other hand, the WCB will rely on the injured worker to provide information related to the impact chronic pain is having on his/her activities of daily living.

As a final step in the assessment process, a WCB Medical Advisor will compare the responses in different sections of the tool to ensure it is providing a consistent picture of the pain. If the responses present an inconsistent picture, the Medical Advisor will request additional information be gathered. Injured workers may be required to undergo a medical examination if the Medical Advisor determines it is necessary to get further information in relation to the impact chronic pain is having on the worker's life.

2. The Pain-Related Impairment assessment tool relies heavily on information from health care professionals. These individuals are firstly responsible for protecting the best interest of their patients. Therefore the role of the WCB Medical Advisor is essential in cross checking the information.

Response:

WCB Medical Advisors are Certified Independent Medical Examiners (CIME) trained in the use of AMA Guides. The Medical Advisor conducts both Permanent Medical Impairment and Pain Related Impairment assessments.

In conducting a PRI assessment, the Medical Advisor will consider all relevant information – medical, functional, psychological, etc. to complete the PRI Assessment Tool. Once the tool is completed, the Medical Advisor will consider whether the information presents a consistent or conflicting picture of the impact pain is having on the worker. If the information is conflicting, the Medical Advisor may request that additional information be gathered or may conduct an in-person medical exam to resolve any discrepancies.

3. A physician's credibility score should be incorporated as part of the tool.

Response:

The scoring of a worker's credibility is not considered appropriate for a workers' compensation environment.

Judging a worker's credibility is subjective and can make consistency in decision-making challenging as the credibility score is based on an individual opinion.

The WCB anticipates an increase in the number of appeals, if chronic pain benefits were limited or denied based solely on a Medical Advisor's score of a worker's credibility. To make the assessment process more objective and transparent and to minimize appeals, the WCB has developed an in-house assessment tool based on a multidisciplinary approach as outlined in Policy 3.3.5.

The tool draws upon a variety of information sources that is used by the Medical Advisor to answer a series of pre-established questions. For each question, the impairment categories (no impairment, slight impairment and substantial impairment) have descriptors that aid in consistent decision-making.

(Please also refer to #5 in the Worker Input section.)

4. **File review for purposes of determining eligibility of chronic pain should mandatorily include a physician's input.**

Response:

In all cases a Medical Advisor will complete the pain-related impairment assessment regardless of whether it is conducted by way of a medical examination or a file review.

In situations where a PRI assessment is conducted by means of a file review, the Medical Advisor continues to be responsible for conducting the assessment and completing the PRI assessment tool.

The key difference between a file review and a medical examination is that with a file review, the worker is not required to see the Medical Advisor in person for a formal face-to-face medical examination.

If all information that is necessary to accurately complete the PRI assessment tool is on the worker's file, it may not be necessary for the Medical Advisor to see each and every client.

5. **The requirement for a causal connection should be included in the preamble of Policy 3.3.5.**

Response:

The need for a "causal connection" to the workplace injury is an important component of the eligibility criteria outlined in the *Chronic Pain Regulations*. This requirement is reflected in the eligibility criteria section of Policy 3.3.5.

The preamble of a policy is not legally binding. Therefore, the WCB believes it is more appropriate to include this requirement in the eligibility section of the policy.

6. **The determination of causal connection should be made prior to the assessment.**

Response:

A causal connection to a workplace injury will be established before an injured worker is found eligible for a pain-related impairment assessment.

In accordance with the *Chronic Pain Regulations* and policies, an injured worker must satisfy a number of eligibility criteria before he/she is entitled to an assessment to determine eligibility for benefits/services. These criteria include:

- Satisfy the definition of chronic pain as identified in section 10A of the *Workers' Compensation Act*;
- Chronic pain is causally connected to the original compensable injury; and
- Medical evidence establishes that the chronic pain developed on or after April 17, 1985.

7. The policy should remain silent on the issue of "unratable" pain.

Response:

Section 6(b) of the *Chronic Pain Regulations* speaks directly to the issue of "unratable" pain and specifies that the slight and substantial impairment percentages will also apply to "unratable" pain. WCB policy must be consistent with the *Chronic Pain Regulations*.

The *AMA Guides - 5th Edition* identify a number of conditions considered to be "unratable" including many of the conditions contained in the *Workers' Compensation Act* definition of chronic pain i.e. chronic pain syndrome, fibromyalgia and myofascial pain.

It is important to clarify in policy that the specific "unratable" conditions included in the *Act's* definition of chronic pain are to be treated the same as other "ratable" conditions.

8. There should be assurance that the scoring approach used in the assessment tool is applied with guidelines to ensure consistency and objectivity in determining impairment.

Response:

The PRI Assessment tool described in Policy 3.3.5 is not based on a scoring approach. The WCB modified the tool proposed in the *AMA Guides - 5th Edition* to improve objectivity, transparency, and consistency and to make the tool more multidisciplinary in scope.

The tool proposed in the *AMA Guides - 5th Edition* relies heavily on subjective measures - including a worker's self report and a Medical Advisors' score for credibility and pain behavior. The WCB built on the framework established by the *AMA Guides - 5th Edition* and created

opportunities to incorporate information from other relevant sources including medical information, functional abilities reports, physiotherapists, psychologists/psychiatrists, etc. to establish a full picture of the impact pain is having on the worker.

To improve transparency and consistency the WCB established a pre-set of questions as outlined in the PRI Assessment Tool that a Medical Advisor must answer in every case. In answering each question, the Medical Advisor must also determine, based on the response, if the answer indicates the worker is experiencing no impairment, slight impairment or substantial impairment.

To enhance objectivity and consistency in this exercise each pain-related impairment category has been assigned a descriptor for each question. For example, the following question is included in the tool "Is the worker using medication due to their pain". In answering this question, the Medical Advisor will review the medical information. Based on the response, the Medical Advisor will determine if the answer is indicating no impairment (worker does not take medication), slight impairment (worker takes medication daily or as needed, may take over-the-counter medication on regular basis, but does not have a regular prescription) or substantial impairment (worker takes the regular maintenance dosage or prescription medication to control pain).

After completing all questions, the Medical Advisor will have a picture of the overall impact pain is having on the worker – no impairment, slight impairment or substantial impairment. In order to ensure the picture presented is an accurate one, the Medical Advisor will compare responses to similar types of questions included in the tool that rely on different sources of information.

If the responses present an inconsistent picture, the Medical Advisor will request that additional information be gathered.

Suggested Policy Changes Raised by the Workers' Advisers Program (WAP):

1. The phrase "usual" or "normal" in the context of chronic pain suggests that chronic pain is the exception to the usual or normal; i.e., that chronic pain is unusual or abnormal. If chronic pain is described as something that is not "usual" or not "normal", it will not be seen as equally valid as other types of compensable injuries. If chronic pain is not seen as equally valid, it may be that workers with chronic pain will not enjoy the equal access to the workers' compensation system that the Supreme Court of Canada directed.

Based on experience workers do not understand that there may be a pain component in the PMI Guidelines. Therefore the use of the phrase "usual" or "normal" to describe pain may not be necessary. If we accept chronic pain as a distinct class of personal injury, we will not be tempted to compare it to pain, which is a symptom of other classes of injury.

The *Chronic Pain Regulations* state that chronic pain is not a personal injury in and of itself but it does say chronic pain that is causally connected to an original compensable injury may be compensable under the *Workers' Compensation Act*.

By its very definition chronic pain is different from pain that normally accompanies a permanent impairment. As defined in section 10A of the *Workers' Compensation Act*, chronic pain means pain that continues beyond the normal recovery time... or is disproportionate to the type of personal injury that ...predated the pain. That being said, the *Chronic Pain Regulations* and policies ensure that workers with chronic pain have the same access to benefits and services as any other worker.

To ensure clarity, it is important that clients understand that permanent medical impairments granted under the PMI Guidelines or the *AMA Guides – 4th Edition* have always included a factor for pain that is typically experienced with various medical conditions.

The pain-related impairment award is to compensate injured workers who have chronic pain - that is pain that is beyond the normal recovery time or disproportionate to the injury.

A revision to paragraph 11 of Policy 3.3.4R attempts to address the issue raised by WAP. Specifically, the last sentence of paragraph 11 states "The type of injury, pain and suffering, age, education or other social factors are not considerations in the evaluation of impairment." While this statement is accurate and reflects the legal interpretation of "pain and suffering" meaning "loss of enjoyment of life" it may create undo complexity to state that a permanent impairment does not include "pain and suffering" but does include usual pain. To minimize confusion this sentence was removed from draft Policy 3.3.4R before it was finalized.

Suggested Policy change raised by the Workers' Compensation Appeals Tribunal (WCAT):

During the consultation process, WCAT recommended a minor revision to draft Policy 2.4.7R – Normal Recovery Time to create more flexibility in

the policy application. It was suggested that the phrase "estimates of normal recovery time will be made by the board on the expected length of disability for the injured worker's type of injury as set out in the Medical Disability Advisor" be changed to read "...may be made by the board"

As the intent and application of the policy was not impacted by this change the WCB accepted this recommendation.

